

IV. CONTRACTS FOR SERVICE: PERSONAL SERVICE; NON-PERSONAL SERVICE; INDEPENDENT CONTRACTORS AND PRIVATIZATION

A. Contract for Services

Generally, State of Vermont Employees should be used to perform essential governmental functions. However, there are circumstances which justify the use of contractors to complete certain tasks, rather than employees, which may be determined at the discretion of the Appointing Authority. Once the determination has been made to enter into a Contract for Service, applicable State law and the policies and procedures set forth in this Bulletin will apply, regardless of amount.

Contracts for Service are further categorized into Personal Service and Non-Personal Service (Independent Contractor). Both Contracts for Service and Non-Personal Service Contracts may be determined to be Privatization Contracts in accordance with 3 V.S.A. § 341(3). The determination process as to whether a Contract for Service is to be categorized as Personal Service or Non-Personal Service and as Privatization is must be done in a specific order and must be in compliance with federal and State laws. The process is graphically represented on page 16.

There are various types of services which may be contracted, including the following examples:

1. **Professional Services Contracts:** contracts with professionals such as physicians, nurses, lawyers, engineers, architects, certified public accountants, surveyors, mental health counselors, educators, consultants, investment managers and IT project managers. In addition to the State's standard insurance requirements, professionals must agree to carry professional liability insurance coverage in an amount not less than \$1 million per occurrence/\$1 million aggregate. Coverage limits will be subject to the approval of the Director of Risk Management (see Insurance Coverage Limit section IX.A.6)
2. **Construction Contracts:** contracts for infrastructure construction, renovation or rehabilitation projects, including such State facilities as State-owned or leased buildings, roads and bridges.
3. **Marketing Contracts:** contracts for advertising (print, radio, TV, and web/internet, but not to include employee recruiting); collaterals (brochures, fact sheets, folders, etc.); web site design (not to include technical components); trade shows and events; direct mail campaigns; and sponsorships.
4. **Data Usage and/or Sharing Contracts:** Contracts for data usage and/or data sharing carry inherent risks that must be considered when Agencies contemplate a data sharing RFP and/or contract. In some instances, data sharing contracts have a quid-pro-quo pricing element where the outside party agrees to provide data services in exchange for use of State of Vermont data for its own purposes, rather than the traditional fee for service pricing. In such cases, regardless of whether there is a stated maximum amount of \$0, a formal contract with all appropriate terms and conditions is required. Agencies must seek the advice of the AGO when entering into such agreements. The sharing of and/or allowing the usage of State of Vermont Data carries with it additional considerations such as: how the data will be used; security of the data; protection for confidential information; access to the data; ownership of the data; and return or destruction of data.

5. **Financial Transaction Contracts:** Contract with a bank or other entity to handle in-bank or on-line financial transactions. The majority of contracts previously and incorrectly referred to as “No Cost” are in reality “Financial Transaction” contracts, which may result in “no net-cost” to the State. These contracts involve an outside Vendor providing a service to manage financial transactions for the State – either online or in person. Vendors include web-portal organizations, banks and other financial institutions. The Vendors handling these financial transactions (license, permit, registration fees, credit card transactions, etc.) on behalf of the State, may be compensated from: the gross fee (revenue) charged in the transaction; via an additional “convenience fee” added to the cost of the transaction; or a combination of the two. Depending on the terms of the contract, the funds may be remitted to the State:

- via a lock-box, under agreement with the State Treasurer’s Office;
- by the Vendor, at the gross amount, followed by payment of the fee from the State to the Vendor; or;
- by the Vendor, at the net amount, where the Vendor retains their compensation prior to remittance.

In the second bullet above, departments must execute the contract for a maximum amount based on the estimated value the Vendor will be paid during the term of the contract. Departments shall process payments using a Purchase Order(s) (P.O.) against the contract. In the third bullet above, where the Vendor retains an amount equal to the additional convenience fee ONLY, a P.O. is not necessary as the State is not issuing payment to the Vendor.

6. **Zero Dollar (or No-Cost) Contracts:** are occasionally used when a Vendor performs services for compensation other than direct payment made by the State. Zero-Dollar contracts must use the Standard State Contract forms, including the Standard Attachment C. Agencies must understand that simply because compensation is not made by invoice and direct payment, Vendors will still have performance obligations and pose risks to the State. Agencies are also cautioned to be aware of potential Conflict of Interest issues. Examples of Zero-Dollar (or "No Cost") contracts include the following:

- the Vendor contracts with the State to perform services which benefit employees or consumers, and payment is derived from third party payers;
- the Vendor performs services for the State in exchange for the opportunity to utilize State facilities or other assets (excluding data; see #5. above) such as Statehouse cafeteria food service; and
- Financial Transaction Contracts.

7. **Information Technology Services Contracts:** see special IT contract paragraph E below.

8. **Other Contracts for Services:** contracts with persons or legal entities not included in subsections (1) through (7) above.

B. Personal Service Contract

1. Description.

A Contract for Service can be either Personal Service Contract or Non-Personal Service Contract (Independent Contractor). Personal Service Contracts have characteristics of an employment relationship not commonly found in Independent Contractor relationships, but they may trigger certain requirements under federal and State taxation and labor laws, such as the requirement to withhold FICA, and provide unemployment and workers' compensation coverage. Agencies must appropriately classify whether each individual performing services for the State is either as an Independent Contractor or an employee-like personal services contractor.

2. Determination Process.

The general rule is that an individual is an Independent Contractor if the Agency for which the services are performed, has the right to control or direct only the result of the work and not the means and methods of accomplishing the result. Appointing Authorities must determine whether proposed Contracts for Service meet **ANY** of the criteria below:

- a. The Agency will supervise the daily activities or methods and means by which the contractor provides services;
- b. The services provided are the same or substantially similar as those provided by classified state employees within the Agency;
- c. The contractor does not customarily engage in an independently established trade, occupation, profession or business.

If a Contract for Service meets **ANY** one of these criteria Appointing Authorities should review IRS Publication 15-A, attached to this Bulletin as Appendix I(f) which provides additional information on the differences between an independent contractor and an employee and gives examples from various types of occupations. If there is no reasonable basis to classify a contractor as an Independent Contractor, Agencies must consider whether the services could be provided under an actual employment arrangement, such as permanent, temporary or limited service appointment. If employment is not feasible, then Agencies should consider restructuring the contractual relationship in a way that does not trigger federal and State requirements applicable to employers. Personal Services Contracts (i.e., contracts that do not pass the Independent Contractor test applied by the IRS) must be carefully structured to ensure compliance with all federal and state requirements. Consult Appendix I(f) of this Bulletin and the Department of Human Resources for guidance.

All Personal Services Contracts shall require approval from the Department of Human Resources prior to execution and, if approved, must be paid through the State VTHR payroll system. .

C. Non-Personal Service Contract

Non-Personal Service Contracts generally have the characteristics of Independent Contractor relationships, where the State has only the right to control or direct the result of the work and not the details of what and how the work will be done. For example, individuals such as (but not limited to) doctors, dentists, veterinarians, lawyers, accountants, construction contractors and subcontractors, public stenographers, or auctioneers who exercise a high degree of independence in performing services and are in an independent trade, business, or profession in which they offer their services to the public.